ASSOCIATION OF BANK OFFICERS, PENINSULAR MALAYSIA

v.

MALAYAN COMMERCIAL BANKS ASSOCIATION

HIGH COURT MALAYA, KUALA LUMPUR
FAIZA THAMBY CHIK JC
[ORIGINATING MOTION NO. R8-32-135-88]
16 JANUARY 1989

LABOUR LAW: *Application under s. 33 of the Industrial Relations Act 1967 - Coram - Specially constituted Court under s. 22(1) - Application for order of Certiorari & Mandamus - Whether application frivolous & vexatious - Section 33A(3) of the Industrial Relations Act - Whether Industrial Court had acted ultra vires - Order 53 RHC - Enforcement of private rights - Whether can be permitted - Prima facie case.*

The applicant and the respondent were parties to Industrial Court award No. 54/81 and the 1984 collective agreement.

The applicant applied under s. 33(1) of the Industrial Relations Act 1967 for interpretation of Article 34 of the abovesaid award and Article 31 of the collective agreement.

Section 33(5) of the Industrial Relations Act requires that the same coram which made award No. 54/81 to be converted. However, as this was not possible, a Court specially constituted under s. 22 of the Act was required.

Section 22, however deals only with trade disputes and not for a case on interpretation. This gave rise to the unusual interpretation that once the President of the Industrial Court has been changed, parties cannot apply for an interpretation under s. 33 of the Act in respect of an award made by a coram with the ex-President as the deciding officer.

The applicant now by an *ex-parte* notice of motion, applied to this Court for an order that:

(1) leave be granted to apply for an order of *certiorari* to bring up and quash Industrial Court award No. 234 of 1988 dated 9 September 1988.

(2) leave be granted for an order of *mandamus* directed to the Industrial Court to hear and determine according to law the applicant's application for interpretation dated 23 May 1988 under s. 33(1) of the Industrial Relations Act 1967 by a different division which made the award No. 234.

Held:

[1] The application in the instant proceeding was not for an order of *certiorari* but rather leave to apply for such an order. The very matter in question had been exclusively and contractually settled in award No. 88/88 and as such this application was in fact frivolous and vexatious.

[2] The Industrial Court in this matter had acted within jurisdiction and neither exceeded nor acted without jurisdiction.

[3] The Articles in award No. 324/86 and award No. 88/88 were derived exclusively from contract, that is rights of particular employees *vis-a-vis* their employers and as such O. 53 Rules of the High Court 1980 cannot be permitted for the enforcement of such private rights.

[4] If the applicant is minded now to bring the matter up for interpretation they will be time barred under s. 33(A)(3) of the Industrial Relations Act 1967 and further this application has been left so late as to threaten the consistency and certainty which is thought necessary to good public administration.

[5] The documentary evidence adduced in this application by the applicant has failed to produce sufficient evidence to sustain a *prima facie* case.

[Application dismissed.]

Cases referred to:

Oversea-Chinese Banking Corporation Ltd. v. Association of Bank Officers [1986] ILR December 1370

Malayan Commercial Banks Association and Association of Bank Officers, Peninsular Malaysia [1988] ILR April 280

Legislation referred to:

Industrial Relations Act 1967, s. 33

Rules of the High Court 1980, O. 53

For the applicant - Antony Nicholson; M/s. Lobo & Associates

JUDGMENT

Faiza Thamby Chik JC:

The applicant and the respondent were parties to the Industrial Court Award No. 54/81 and the 1984 collective agreement. The coram of the Court that decided the Award No. 54/81 was:

(1) The honourable Mr. Justice Harun (as he then was),

(2) Mr. S. Sellapah,

(3) Encik Mohd. Samsudin Shafie, KMN, and

(4) Mr. Lim Fun Saw

and the effective date of the award was 1 February 1980. The applicant applied under s. 33(1) of the Industrial Relations Act 1967 for interpretation of Article 34 of award No. 54/81 and Article 31 of the collective agreement. The interpretation sought by the applicant is brought under s. 33 of the Industrial Relations Act 1967; and sub-section (5) reads as follows:

> (5) The expression "Court" for the purpose of this section, means the Court by which the award was made or any other Court specially constituted under s. 22 for the purpose.

Therefore s. 33(5) requires the same coram as the one which made the award No. 54/81. It is now impossible to convene that coram. The alternative is a Court specially constituted under s. 22 of the Act for the purpose. Under s. 22(1) the constitution of a Court is to deal with a trade dispute (not for a case on interpretation). Section 22(1) therefore cannot be used to specially constitute a Court for a case on interpretation. The other sub-sections made provision for substitution of any panel members but not of the President. This gives rise to the unusual interpretation that once the President of the Industrial Court has been changed parties cannot apply for an interpretation under s. 33 of the Act in respect of an award made by a coram with the ex-President as the deciding officer.

By an *ex-parte* notice of motion, the applicant asks this Court for an order that:

(1) leave be granted to apply for an order of *certiorari* to bring up and quash Industrial Court award No. 234 of 1988 dated 9 September 1988;

(2) leave be granted for an order of *mandamus* directed to the Industrial Court to hear and determine according to law the applicant's application for interpretation dated 23 May 1988 under s. 33(1) of the Industrial Relations Act 1967 by a different division from that which made the said Award No. 234 of 1988.

When the case first came up for hearing on 5 December 1988 in chambers, the Court pointed out to Counsel the provision of O. 53 r. 1(3) of the Rules of the High Court 1980 which reads:

> 1(3) The applicant must give notice of the application for leave not later than the preceding day to the Attorney General's chambers and must at the same time lodge in those chambers copies of the statement and affidavits.

The case came up for hearing again on 7 December 1988 in open Court; and on that date, Counsel for the applicant produced an affidavit of service dated 5 December 1988 served on the Attorney General's chambers. Counsel for the applicant did not submit anything at the hearing except to rely on the statement made under O. 53 r. 1(2) dated 7 October 1988. The said Counsel made neither submission nor produced any authorities. Accordingly, I am forced to consider this application for leave on the documents alone, i.e., materials which made up the tribunal record (encl. 3), and after careful perusal of the materials, I dismissed the application.

I dismissed the application for the following reasons.

At the outset, it must be pointed out that the application in the instant proceeding was not for an order of *certiorari* but rather for leave to apply for such an order. At this stage of the proceeding, the Court is required only to enquire whether the matter to be decided by the Court is not in fact frivolous and vexatious in the sense that it is a trivial complaint of an administrative error by a trade union of employees in the banking industry with a misguided sentiment and misconception of the law.

It is important in order to give a proper consideration of the nature of the relief sought at this initial stage to ask the following two questions:

(1) What was the thing complained of?

(2) Why was it said to be bad?

The answer to the first question was that the applicant complained of the Industrial Court award No. 234 of 1988 dated 9 December 1988; and to the second question, the answer was in giving the said award, the Industrial Court had exceeded its jurisdiction and/or acted without jurisdiction.

In his statement in reply, the respondent stated the interpretation sought by the applicant is Article 34 of award 54/81 and Article 31 of the 1984 collective agreement; and the respondent submitted that this very question for interpretation had already been raised by the applicant as a trade dispute and has been determined by the Industrial Court in award No. 324 of 1986. Award No. 324 of 1986 is between the *Oversea-Chinese Banking Corporation Ltd. and Association of Bank Officers [1986] ILR Dec 1370.* At p. 1374 para. 8, it states:

> Article 30(1)(a) is one of the provisions in the agreement which has been taken cognisance of by the Court and by virtue of s. 17(1)(a) of the Industrial Relations Act 1967, it is binding on the bank and the union and all workmen who are employed in the undertaking to which the agreement relates. Unless it is varied by a subsequent agreement or decision of the Court, it shall be an implied term of the contract between the workmen and the employers bound by the agreement that the terms of employment are to be observed under the contract. The agreement has been given statutory recognition as a valid, binding and enforceable contract and it is only logical that it should specifically be enforced. Because of this, the agreement shall prevail. And because of this, the bank's retirement policy has, in the absence of any statutory protection, to take the back seat. The union knows this, otherwise it would not have raised this up at the MCBA/ABOM meeting on 14 and 15 April 1981 but unfortunately it did not actively pursue the matter to have the bank's retirement policy included on a personal-to-holder basis for those who are affected by it. In the absence of such a variation, we are of the view that the bank can require the claimants to retire in accordance with s. 30(1)(a) of the agreement. We therefore, hold that the claimant's retirement is not a termination of service without just cause or excuse. They were properly retired and as such we dismiss the union's case.

In the premises, I consider that as the matter has been adjudicated previously in award No. 324/86 as mentioned above, I therefore conclude that this application is in fact frivolous and vexatious.

The subsisting collective agreement is taken cognisance of by award No. 88 of 1988 which is between *Malayan Commercial Banks Association and Association of Bank Officers, Peninsular Malaysia [1988] ILR April 280* where at p. 281 it was held:

(1) *Effective Date and Duration:*

> The union proposed that the Award be back-dated six months from the date of the Minister's reference and be valid for a period of three years. The association asked that the Award be effective from 1 January 1988 and be valid for a period of four years. The Court orders that the award be effective from 1 January 1987 and expire after a four year period on 31 December 1990.

Therefore, if the applicant is minded now to bring this matter up for an interpretation before this Court, they will be held time-barred because s. 33A(3) of the Industrial Relations Act states:

> (3) An application under this section shall be made within thirty days of the date on which the award was made.

Anyway, this application has been left so late as to threaten the consistency and certainty which is thought necessary to good public administration.

Another requirement which the Court has to consider at this stage of the proceeding is that the application must comprise sufficient evidence to sustain a *prima facie* case that the Industrial Court which made the Award No. 234/88 had acted unlawfully or *ultra vires* the power given to it under the Industrial Relations Act 1967. It is my considered opinion that the Industrial Court in this matter had acted within jurisdiction and had neither exceeded not acted without jurisdiction. From what I have just stated above and after careful perusal of the materials placed before me in encl. 3, I come to the conclusion that the very matter in question has been exclusively and contractually settled in Award No. 324/86 and Award No. 88/88. And a matter which is exclusively contractual in nature is not within the province of O. 53 Rules of the High Court 1980. In a manner of speaking, those Articles in Award No. 324/86 and Award No. 88/88 are derived exclusively from contract in the sense rights of

particular employees *vis-a-vis* their employer. Order 53 Rules of the High Court 1980 cannot therefore be permitted for the enforcement of such private rights. Accordingly, I have come to the conclusion from the documentary evidence adduced in this application that the applicant has failed to produce sufficient evidence to sustain a *prima facie* case.

The application for leave is therefore dismissed.

Also found at [1989] 1 CLJ 425